BUNGY MALAYSIA SDN BHD A

v.

MENARA KUALA LUMPUR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[ORIGINATING SUMMONS NO: D-24NCC-82-2010]
10 AUGUST 2010

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application to restrain defendants from termination - Collaboration Agreement pending conclusion of arbitration proceedings - Whether there were serious issues to be tried - Balance of convenience - Status quo - Whether interlocutory injunction sought was in effect an interlocutory mandatory injunction in substance couched in prohibitory terms - Whether interlocutory prohibitory injunction would grant plaintiff full relief sought in arbitration proceedings* C D

The defendant was the lessee of the land along Jalan Bukit Nenas, Kuala Lumpur owned by the Government of Malaysia (the Tower Land) on which the Menara Kuala Lumpur (the KL Tower) is located and of the KL Tower itself which is owned by Telekom Malaysia Berhad. The plaintiff entered into a Collaboration Agreement ("CA") with the defendant to develop, install and operate at least five adventure activities known as "the sky walk, twin flying foxes, mast climb, reverse bungy sling shot" in Phase 1 and the "sky jump and bungy jump" in Phase 2 at the KL Tower. The initial period of the CA was 3 1/2 years which lapsed on 31 May 2009 (the initial period). It was a term of the contract that the duration of the CA may be renewed at the option of the defendant for two further terms of ten years each, subject to the lease of the Tower Land including the KL Tower being extended in favour of the defendant, pursuant to cl. 3 of the CA. It was the intention of the parties or at the very least the understanding of the plaintiff that the defendant could only refuse to renew the CA if the relevant authorities did not extend the lease of the Tower Land held by the defendant. Notwithstanding the expiry of the CA on 31 May 2009, the defendant allowed the plaintiff to continue with its adventure activities from 1 June 2009. However, on 9 Disember 2009, the defendant wrote to the plaintiff informing that they wished to terminate the CA. It was a term of the CA that the defendant E F G H I

would set up and implement the Phase 2 activities concurrently with or soon after the commencement of the Phase 1 activities at the defendant's cost. The plaintiff completed and commenced operations of the Phase 1 activities but the defendant failed to set up and implement the Phase 2 activities at its own cost. The non-operation of the Phase 2 activities caused the plaintiff losses. The plaintiff thus gave notice to the defendant to refer the dispute to arbitration two days after the defendant had given notice to the plaintiff to cease all its business operations. In the notice of arbitration, the plaintiff sought declaratory relief that the CA be renewed and for specific performance of the same. Pending disposal of the arbitration proceedings, the plaintiff sought an injunction to preserve the status quo of the matter on the grounds that irreparable injury will be caused to the plaintiff if the defendant took steps to interfere with or interrupt the plaintiff's business operations before the conclusion of the arbitration proceedings. The defendant contended that the interlocutory injunction sought by the plaintiff was in effect an interlocutory mandatory injunction in substance although the words of the proposed injunction were couched in prohibitory terms.

Held:

(1) The issue of whether there should be specific performance of the CA by the defendant, whether cl. 3 of the CA ought to be rectified to reflect the true intentions of the parties, whether the defendant was estopped from denying that the CA had been extended in view of the conduct and position taken by the defendant immediately before the CA was signed and after the expiry of the initial period and the defendant's failure to commence the Phase 2 adventure activities were serious issues to be determined by the Arbitrator. (paras 6.1.10 - 61.12)

(2) As the arbitration proceedings had commenced with the plaintiff giving notice on 19 March 2010, the interlocutory prohibitory injunction ought to be granted to the plaintiff to maintain the *status quo* of the matter. Without the grant of the interlocutory injunction the plaintiff would be forced to dismantle and remove all the features and structures put in place for the operation of the adventure activities pending the determination of the plaintiff's claim in the arbitration proceedings. This would result in unnecessary costs and wastage to the plaintiff if it were to succeed in the arbitration

proceedings. On the other hand the defendant failed to show any irreparable damage they would suffer if the interlocutory injunction was granted. The balance of convenience lay in favour of the plaintiff. (paras 6.1.15 & 6.1.16)

(3) An interlocutory prohibitory injunction would not grant the full relief to the plaintiff which they were seeking in the arbitration case. (para 6.1.19)

(4) Since the defendant was holding over the lease of the Tower Land, it was only fair and equitable that the plaintiff should be allowed to continue its operations until such time it is conclusively established that the defendant will not be granted the extension of the lease of the Tower Land. (para 6.5)

(5) The order granted was restricted to the negative covenants to be observed by the defendant. The court did not order the defendant to perform any positive acts in favour of the plaintiff. (para 7)

[Order accordingly.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Bee Ya Hock v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Another Case [1994] 2 CLJ 753 HC ***(refd)***

Bina Satu Sdn Bhd v. Tan Construction [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Joscelyne v. Nissen and Anor [1970] 1 All ER 1213 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 11(1)(f), (g), (h)
Rules of the High Court 1980, O. 29 rr. 1, r. 2
Specific Relief Act 1950, ss. 20(1)(g), 54(f)

For the plaintiff - Yap Boon Hau; M/s Mah-Kamariyah & Philip Koh
For the defendant - Khoo Guan Huat (Jeffri Cheong with him); M/s Skrine

Reported by Amutha Suppayah

JUDGMENT

Mah Weng Kwai JC:

[1] The plaintiff by its originating summons (encl. 4) dated 19 March 2010 sought an interlocutory prohibitory injunction pursuant to s. 11(1)(f) and/or (g) and/or (h) of the Arbitration Act 2005 and/or O. 29 r. 1 and/or r. 2 of the Rules of the High Court 1980 pending the disposal of the dispute by arbitration between the parties to restrain or prevent the defendant and/or its agents, employees or officers from:

(a) terminating or discontinuing the collaboration agreement dated 27 January 2006;

(b) interfering or obstructing the operations of the plaintiff's business and

(c) notifying and/or informing the public that the plaintiff's business has been terminated and/or discontinued.

[2] Brief Facts

2.1. The defendant is the lessee of the land along Jalan Bukit Nenas, Kuala Lumpur owned by the Government of Malaysia (the Tower Land) on which the Menara Kuala Lumpur (the KL Tower) is located and of the KL Tower itself which is owned by Telekom Malaysia Berhad.

2.2. The plaintiff entered into a collaboration agreement with the defendant to develop, install and operate at least five adventure activities known "the sky walk, twin flying foxes, mast climb, reverse bungy sling shot" in Phase 1 and the "sky jump and bungy jump" in Phase 2 at the KL Tower.

2.3. The initial period of the collaboration agreement was 3 1/2 years which lapsed on 31 May 2009 (the initial period). It was a term of the contract that the duration of the collaboration agreement may be renewed at the option of the defendant for two further terms of ten years each, subject to the lease of the Tower Land including the KL Tower being extended in favour of the defendant, pursuant to cl. 3 of the collaboration agreement. Clause 3 of the collaboration agreement reads:

> Unless sooner terminated pursuant to clause 11 thereto, this Agreement shall commence on the Effective Date and shall continue in full force and effect for an initial term until 31 May 2009 and may be renewable at the option of MKLSB for two further terms of 10 years each thereafter, subject to the lease or rights to the Tower Land including the KL Tower being granted to MKLSB for the duration of the extended terms.

2.4. It was the intention of the parties or at the very least the understanding of the plaintiff that the defendant could only refuse to renew the collaboration agreement if the relevant authorities did not extend the lease of the Tower Land held by the defendant.

2.5. Notwithstanding the expiry of the collaboration agreement on 31 May 2009, the defendant allowed the plaintiff to continue with its adventure activities from 1 June 2009.

2.6. However, on 9 December 2009, the defendant wrote to the plaintiff informing that they wished to terminate the collaboration agreement. By letter dated 17 March 2010, the defendant insisted that the plaintiff cease its business operations by 21 March 2010 and to deliver vacant possession of its premises.

2.7. It was a term of the collaboration agreement that the defendant would set up and implement the Phase 2 activities concurrently with or soon after the commencement of the Phase 1 activities at the defendant's cost.

2.8. The plaintiff completed and commenced operations of the Phase 1 activities but the defendant refused and/or failed to set up and implement the Phase 2 activities at its own cost.

2.9. As the defendant had failed to commence and fund the Phase 2 activities, the plaintiff has been suffering losses from the non-operation of the Phase 2 activities and from the lack of potential customers of the Phase 1 activities.

2.10. As the defendant has refused to allow the plaintiff to continue with its operations after 31 May 2009 and as the defendant has refused to commence and fund the Phase 2 activities after numerous reminders, the plaintiff gave notice to the defendant to refer the dispute to arbitration on 19 March 2010 that is, just two days after the defendant had given notice to the plaintiff to cease all its business operations.

2.11. Pending disposal of the arbitration proceedings, the plaintiff sought an injunction to preserve the *status quo* of the matter *inter alia* on the following grounds:

(a) irreparable injury will be caused to the plaintiff if the defendant took steps to interfere with or interrupt the plaintiff's business operations before the conclusion of the arbitration proceedings;

(b) there are serious questions to be tried;

(c) the balance of convenience lies in favour of the grant of the interlocutory injunction;

(d) there will be no prejudice to the defendant if the order is granted and

(e) in view of the justice of the case.

[3] The Plaintiff's Case

3.1. The plaintiff served the notice of arbitration to the defendant seeking declaratory relief that the collaboration agreement be renewed and for specific performance of the same.

3.2. Before the collaboration agreement was signed, and upon the request of the defendant that the operation of the adventure activities be set in place as quickly as possible, the plaintiff invested about RM2 million to set up and operate the Phase 1 activities.

3.3. By cl. 3 of the collaboration agreement, the plaintiff understood the clause to mean that only in the event the defendant's lease of the Tower Land was not extended, then the plaintiff would not be allowed to continue with the operations of its adventure activities.

3.4. Upon the expiry of the initial period, the parties exchanged correspondence on the relocation of the site office which indicated the defendant's intention to allow the plaintiff to continue with its business operations. It was only by letter dated 9 December 2009 that the defendant gave notice to the plaintiff to cease all operations on the ground that the collaboration agreement had expired.

3.5. Counsel for the plaintiff submitted that the plaintiff would apply to rectify cl. 3 of the collaboration agreement at the arbitration proceedings to reflect the true intention of the parties on the entire duration of the collaboration agreement.

3.6. Counsel contended that the defendant is estopped from denying any extension of the collaboration agreement in view of the position taken by the defendant immediately before and after the expiry of the initial period on 31 May 2009. Counsel referred to the Court of Appeal case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 where Gopal Sri Ram JCA (as he then was) held:

> It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a Court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

3.7. Due to the various statements made by the defendant's former Chairman that the sky jump activity would be implemented in August 2006, the plaintiff invested an additional sum of RM500,000 in anticipation of the commencement of the Phase 2 activity.

3.8. The defendant is estopped from stating that there is no Board of Director's resolution to approve the Phase 2 activities when the collaboration agreement stipulates that the Phase 2 activities must be commenced concurrently with the Phase 1 activities. The board of directors having approved the collaboration agreement must be taken to have approved the Phase 2 activities as well.

3.9. Counsel for the plaintiff contended that the following *inter alia* are serious questions to be tried:

(i) whether the true intention of the parties was to engage in long term business relationship for a term of at least 23 1/2 years.

(ii) whether on a proper construction of the collaboration agreement and based on the conduct of the parties, the defendant is estopped from terminating the contract by letter dated 9 December 2009.

(iii) whether the defendant has agreed to renew or extend the contract for another two terms of ten years each.

(iv) whether the defendant had approved the Phase 2 activities.

(v) whether the defendant had breached the collaboration agreement by failing to fund and commence the Phase 2 activities.

3.10. Balance Of Convenience.

Counsel for the plaintiff contended that the plaintiff would suffer irreparable damage if the injunction is not granted as:

(i) the defendant may violate the exclusive right of the plaintiff to continue operation of the adventure activities,

(ii) the plaintiff would be compelled to remove all its installations and structures,

(iii) the plaintiff's claim for specific performance will be nugatory and

(iv) the livelihood of the plaintiff's ten employees would be affected.

3.11. Counsel for the plaintiff further contended:

(i) that the plaintiff's reputation as well as the brand name of "AJ Hackett" would be tarnished by the termination of the collaboration agreement,

(ii) that plaintiff's plan to expand its business operations to include the Alor Star Tower will be affected adversely thereby suffering loss of business opportunity which cannot be adequately compensated by damages,

(iii) that the plaintiff will suffer loss of profits for the next 20 years,

(iv) that the plaintiff will suffer an estimated loss of about RM139 million from the sky jump activity alone and that this loss will exceed the entire assets of the defendant,

(v) that the plaintiff should not be limited to the remedy of damages only and

(vi) that there will be no irreparable harm done to the defendant as there is no evidence that the Tower Land is being required for any other purposes.

[4] The Defendant's Case

Counsel for the defendant contended *inter alia*, that:

4.1. The interlocutory injunction sought by the plaintiff is in effect an interlocutory mandatory injunction in substance although the words of the proposed injunction are couched in prohibitory terms. The plaintiff seeks to renew the collaboration agreement which has already expired on 31 May 2009 by compelling the defendant to retract their notice not to renew the collaboration agreement.

4.2. The granting of an injunction on the terms as claimed by the plaintiff would in fact and in substance give to the plaintiff the full and final relief sought to be obtained at the arbitration hearing. The arbitrator has the jurisdiction to make an order or finding that the collaboration agreement is continuing and in full effect which is the very subject matter of the injunction.

4.3. The plaintiff is unable to show any real prospects of success at the arbitration hearing and it is trite that an interlocutory mandatory injunction would not be granted by the court before trial save in exceptional cases.

4.4. The plaintiff has not shown that there are serious issues to be tried in this case.

4.5. The plaintiff is relying on irrelevant conduct, communications or representations between the parties before the collaboration agreement was signed. This constitutes unenforceable extrinsic evidence in view of cl. 18 which is the entire agreement clause in the collaboration agreement.

4.6. Clause 3 of the collaboration agreement stipulates that the Phase 2 activities can only commence upon the approval of the board of directors of the defendant and the Board of Directors of Telekom Malaysia Berhad. At all material times, the plaintiff was aware that there was no formal approval for the Phase 2 activities to commence.

4.7. The collaboration agreement which expired on 31 May 2009 can only be renewed at the option of the defendant for two further terms of ten years each.

4.8. At all material times, the plaintiff was aware that there was no formal renewal of the lease of the Tower Land. The plaintiff does not dispute that the lease has not been renewed.

4.9. The balance of convenience favours the defendant and that the plaintiff is not relying on the terms of the collaboration agreement but rather on what parties had purportedly intended before the collaboration agreement was signed to be the actual duration of the contract. This

in effect constitutes a separate agreement different from the collaboration agreement, the performance of which requires a continuous duty by the defendant to perform its obligations extending for a period beyond three years. As such, the specific performance of this separate agreement must be refused pursuant to s. 20 of the Specific Relief Act 1950 (the SRA). Section 20(1)(g) of the SRA states that a contract cannot be specifically enforced where the performance of which involves the performance of a continuous duty extending over a period longer than three years from its date.

4.10. Following the invocation of the provisions of s. 20(1)(g) of the SRA, counsel contended that an injunction therefore cannot be granted under s. 54 of the SRA to prevent the breach of a contract, the performance of which would not be specifically enforced.

4.11. The remedy of the plaintiff is to sue for damages. The plaintiff cannot compel the defendant to provide services or to assist the plaintiff based on the terms of the collaboration agreement which require extensive cooperation between the parties.

[5] Decision of the court

5.1. Upon a consideration of encl. 4 and the affidavits filed by the parties and upon hearing submissions of counsel, the court granted an order in terms of prayer 1(b) to wit, restraining the defendant from interfering or obstructing in whatsoever manner the operations of the plaintiff's business stipulated in the collaboration agreement. The order is restricted to the negative covenants only including but not limited to the defendant's ten obligations enumerated in para. 12 of the defendant's supplementary submissions (2) (encl. 14). An order in terms was also granted of prayer 1(c), limited to the defendant's directors.

5.2. Prayers 1(b) and 1(c) were granted to the plaintiff pending the disposal of the arbitration proceedings between the parties.

[6] Reasons For Decision

6.1. From the facts of the case, I arrived at the following findings:

6.1.1. The defendant is the lessee of the Tower Land which includes the KL Tower.

6.1.2. Due to the KL Tower being 1 of the taller towers in the world and a significant landmark and tourist attraction in Kuala Lumpur, the plaintiff sought to enter into a long term business relationship with the defendant to set up and operate the five adventure activities comprised in Phase 1 and Phase 2.

6.1.3. Negotiations were entered into between the parties culminating in the collaboration agreement being signed on 27 January 2006. Prior to entering into the collaboration agreement, the parties had intended a long term business relationship of the adventure activities of between 20 to 30 years, with the plaintiff having exclusive rights to operate the same. In order to reduce costs and to make a profit, it was intended that the plaintiff shall be given a contract of three terms of ten years each. The defendant agreed to a "10 + 10" years of tenure after the expiry of the first ten year term which had been reduced to 3 1/2 years, subject only to the extension of the lease of the Tower Land to the defendant by the Government of Malaysia. It was also contemplated by the parties to have the Phase 2 adventure activities commence and be operational at the same time as the Phase 1 activities.

6.1.4. To kick start the adventure activities, the plaintiff invested about RM2 million to set up the operations as quickly as possible.

6.1.5. By June 2006, the parties were aware of the uncertainty of the defendant's position in the extension of the lease of the Tower Land. The

plaintiff agreed that the initial period should be shortened to 3 1/2 years. The plaintiff would then be granted an extension of "10 + 10" years if an extension of the lease of the Tower Land is given to the defendant (see encl. 2 p. 39). Counsel for the defendant contended that the plaintiff was seeking a renewal of the collaboration agreement for another term of 3 1/2 years plus "10 + 10" years. This is not factually correct.

6.1.6. Clause 3 of the collaboration agreement was amended to mean that only the defendant had the option to continue the collaboration agreement after 3 1/2 years (see encl. 2 - exh. A16 p. 68). The plaintiff however understood cl. 3 to mean that when an extension of the lease of the Tower Land is granted to the defendant then the plaintiff shall be allowed to continue with its operations.

6.1.7. With the amendments, the plaintiff had compromised on the initial tenure of the collaboration agreement namely, from ten years to 3 1/2 years but did not compromise on its right to continue with the business operations when the extension of the lease of the Tower Land is granted to the defendant.

6.1.8. It is the plaintiff's case that the option to renew the collaboration agreement under cl. 3 is exercisable by the defendant subject only to the extension of the lease of the Tower Land.

6.1.9. After the expiry of the initial period on 31 May 2009, the parties were still exchanging correspondence on the relocation of the site office which indicated the intention of the parties to continue with the collaboration agreement. It was only on 9 December 2009 that the defendant wrote to the plaintiff maintaining their position that the collaboration agreement had expired.

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6.1.10. A dispute having arisen between the parties on the extension of the collaboration agreement beyond 31 May 2009, the plaintiff has referred the dispute to arbitration. The issue of whether there should be specific performance of the collaboration agreement by the defendant is an issue to be determined by the Arbitrator.

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6.1.11. Whether cl. 3 of the collaboration agreement ought to be rectified to reflect the true intentions of the parties is a serious issue to be determined bearing in mind the principle enunciated in the English Court of Appeal case of *Joscelyne v. Nissen and Anor* [1970] 1 All ER 1213 where the court held that:

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> This was a case of rectification based on antecedent expressed accord on a point adhered to in intention by the daughter and father as parties to the subsequent written contract and since both parties were in agreement up to the moment when they executed the written contract that the daughter should pay all outgoings on Martindale, and the written contract did not conform with that agreement, the court had jurisdiction to rectify the written contract, although there may have been no concluded and binding contract between the parties until the written contract was executed.

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6.1.12. Whether the defendant is estopped from denying that the collaboration agreement has been extended in view of the conduct and position taken by the defendant immediately before the collaboration agreement was signed and after the expiry of the initial period is also a serious issue to be determined. Please refer to the case of *Boustead Trading Sdn Bhd v. Arab-Malaysian Merchant Berhad (supra)*.

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6.1.13. The defendant had failed to fund and commence the Phase 2 adventure activities and that, if not for the press release of the defendant's chairman

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that the Phase 2 activities would be implemented in August 2006 and the oral promises made by the defendant's Chief Executive Officer, the plaintiff would not have expended an additional sum of RM500,000 for the Phase 2 adventure activities. Having the assurance of the defendant, the plaintiff proceeded to implement the Phase 1 activities which were completed in August 2006. The defendant may therefore be estopped from stating that there is no approval from its board of directors to commence the Phase 2 activities.

6.1.14. The issue of the defendant's failure to commence the Phase 2 adventure activities is also a serious issue to be determined by the Arbitrator.

6.1.15. As the arbitration proceedings have commenced with the plaintiff giving notice on 19 March 2010, it is my view that the interlocutory prohibitory injunction ought to be granted to the plaintiff to maintain the *status quo* of the matter. Without the grant of the interlocutory injunction the plaintiff would be forced to dismantle and remove all the features and structures put in place for the operation of the adventure activities pending the determination of the plaintiff's claim in the arbitration proceedings.

6.1.16. In the event the plaintiff is successful in the arbitration proceedings and for them to resume and continue with the adventure activities, the plaintiff would have to expend time, cost and effort to put themselves back to square one. This will result in unnecessary costs and wastage to the plaintiff. On the other hand the defendant has failed to show the kind of irreparable damage they contend they will suffer if the interlocutory injunction is granted.

6.1.17. In this case, the balance of convenience lies in favour of the plaintiff. If the plaintiff is not granted the interlocutory injunction and is not allowed to continue operations of the existing

A adventure activities, they will suffer irreparable damage. According to the defendant's own projection, the income from the sky jump activity alone is RM1.8 million per year. Further, if the plaintiff is compelled to remove all its features and
B structures, the plaintiff's claim for specific performance will be illusory.

6.1.18. I am satisfied that the plaintiff has in this case met the requirements of the principles set out in
C *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293.

6.1.19. Counsel for the defendant submitted that the plaintiff is in fact seeking an interlocutory mandatory injunction in substance and in effect
D although the application is couched in prohibitory terms. Counsel contended that the plaintiff is in fact compelling the defendant to retract its' letter of termination dated 9 December 2009 thereby compelling the defendant to renew the
E collaboration agreement. I am of the view that the defendant's contention is wholly untenable in this case as the plaintiff is not seeking an order to compel the defendant to retract its' letter of termination and to renew the collaboration
F agreement. All that the plaintiff is seeking is merely an order to restrain or prevent the defendant from interfering with or obstructing the plaintiff from carrying on with its' business operations until the arbitration proceedings are
G dealt with. It is simply an order to maintain the *status quo* so that the plaintiff will not have to dismantle the structures for the Phase 1 activities and to vacate the premises pending the
H arbitration proceedings. In this sense the order of an interlocutory prohibitory injunction will not grant the full relief to the plaintiff which they are seeking in the arbitration case. The argument by counsel for the defendant that an interlocutory
I mandatory injunction would not be granted before trial save for very exceptional cases would therefore not apply in this instance. Further, the

test of a standard higher than that canvassed in the case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 of an unusually strong and clear case and of special circumstances before the court, that the plaintiff is required to satisfy in an application for an interlocutory mandatory injunction would not apply as well.

6.1.20. Counsel for the defendant contended that there are no serious issues to be tried and that the plaintiff has no real prospect of success. I am of the view that the plaintiff has established that there are serious issues to be tried and whether or not the plaintiff will be eventually successful on its claim before the Arbitrator is surely not an issue for the court to adjudicate at this stage. In any event the plaintiff has the contractual right to refer the dispute to arbitration and it is not for the court to curtail this right. Also, whether or not the plaintiff can raise the issue of estoppel against the defendant by reason of its conduct before the execution of the collaboration agreement is a matter for the Arbitrator to determine. It is not open for the defendant to submit at this stage that the defendant's conduct before the collaboration agreement was signed is irrelevant in view of the entire agreement clause in the collaboration agreement and that no extrinsic evidence can be referred to.

6.1.21. I am of the view that the central issue in this case is whether or not the defendant can maintain the position that they are not at liberty to renew the collaboration agreement in light of the fact that the lease granted by Telekom Malaysia Berhad to the defendant has not been renewed, as no decision has been made by Telekom Malaysia Berhad to date. That is an issue for the Arbitrator to determine. Another issue for the Arbitrator to determine is whether or not the defendant is obliged to commence and fund the Phase 2 activities without the formal approval of the same by the board of directors of the defendant and of Telekom Malaysia Berhad.

6.1.22. While I do not disagree that the collaboration agreement can be terminated after the initial period, I am of the view that the discretion of the defendant not to renew the collaboration agreement may only be exercised when the lease of the Tower Land has not been renewed.

6.1.23. It would appear that the real reason for the defendant wanting the plaintiff to cease all its business operations and to vacate its premises is that the defendant is not deriving any income from the plaintiff from its Phase 1 activities and at the same time the plaintiff is occupying the defendant's premises, for example its ticket booth, which space can be rented out from between RM4,000 to RM5,000 per month. In short the defendant feels that the plaintiff is leeching off them and that is why the defendant wants them to vacate their premises.

6.1.24. While damages may be quantifiable in the event the order of injunction should not have been granted, I am of the view that such damages may not be adequate given the huge loss of income and profit, and the loss of reputation the plaintiff will suffer.

6.1.25. The plaintiff's application is made under s. 11(1) of the Arbitration Act 2005. The relief sought by the plaintiff is interlocutory or interim in nature namely to preserve the *status quo* of the subject matter pending the determination by the Arbitrator in the arbitration proceedings. An interlocutory injunction is limited so as to apply only until the final hearing or final determination by the court of the rights of the parties and in this case, pending the final award by the Arbitrator.

6.2. Operation of s. 20(1)(g) and s. 54 of the SRA

6.2.1. To decide whether the provisions of s. 20(1)(g) apply in this case, the court will have of necessity to determine whether the contract sought to be

extended by the plaintiff will involve "the performance of a continuous duty" by the defendant.

I am of the view that the provisions of s. 20(1)(g) cannot be invoked by the court for the following reasons:

(a) the defendant has failed to set out the material facts to enable the court to consider this contention.

The "continuous duty" point was not taken up in the defendant's affidavits. What amounts to "continuous duty" is a question of fact and ought to be particularised in the affidavits.

In the case of *Bee Ya Hock v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Another Case* [1994] 2 CLJ 753 it was held that matters not raised in the affidavits should not be considered.

The instances of "continuous duty" in this case have instead been enumerated by counsel for the defendant in his submission. The plaintiff did not have the opportunity to adduce evidence on affidavit to rebut the defendant's allegations.

(b) without stating the nature of the "continuous duty" on affidavit, the court was not in a position to determine whether the duty/duties would be too onerous or difficult for the defendant to perform, regardless of the duration of the contract.

(c) considering that there are at least five adventure activities in this case, the defendant has failed to identify the nature and scope of the "continuous duty" envisaged for each activity. The various activities involve different

types of operations and supervision and would require different facilities. No distinction has been made by the defendant on the 'continuous duty' required for each activity and the time required for such performance, whether within three years or a period longer than three years.

(d) the Arbitrator will be in a better position to determine whether the contract can be specifically enforced under s. 20(1)(g) of the SRA, after considering the evidence of the witnesses. The court is not prepared to say at this stage that the contract is incapable of specific performance altogether or even partly.

6.2.2. Section 54(f) of the SRA provides that "an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced".

As I am of the view that the provisions of s. 20(1)(g) of the Act cannot be invoked in this case, the provisions of s. 54(f) of the Act will not apply.

Moreover it was held in the cases of *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83 and *Bina Satu Sdn Bhd v. Tan Construction* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 that s. 54 of the SRA only applies to perpetual injunctions and not to interlocutory injunctions. In this case, the relief sought by the plaintiff is interlocutory or interim in nature that is, to maintain the *status quo* of the subject matter pending the determination of the dispute by the Arbitrator.

The above authorities were subsequently approved by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah and Ors (supra)* and in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533.

6.2.3. Alternatively, taking for a moment the argument that the facts averred by the defendant in the affidavits is sufficient to bring it within the scope of s. 20(1)(g) of the SRA, then it will be incumbent upon the court to consider:

(a) whether the court will be in a position to watch and supervise the performance of the "continuous duty" by the defendant. By implication the "continuous duty" referred to in s. 20(1)(g) of the SRA must be taken to refer to the performance of duties which are continuous and which are difficult for the court to watch and supervise. It is only in cases where the court is "unable to see that the work is carried out" that a contract under s. 20(1)(g) of the SRA cannot be specifically enforced and

(b) whether the performance of the "continuous duty" will cause hardship to the defendant. It will be unjust and contrary to public policy to uphold the proposition that a contract cannot be specifically enforced merely because the "continuous duty" exceeds three years when there is no difficulty whatsoever for the court to supervise the defendant's performance and where there is no hardship whatsoever caused to the defendant. The "continuous duty" should not refer to any form or type of duty.

(c) in cases where there is no difficulty for the court to supervise the "continuous duty" of the defendant or where there is no hardship caused to the defendant, even though the contract extends beyond three years, I am of the view that s. 20(1)(g) of the SRA cannot be invoked to prevent the court from granting an interlocutory injunction to the plaintiff.

A

(d) further, even if s. 20(1)(g) of the SRA applies, the provisions of s. 54(f) of the SRA cannot be invoked as the relief sought by the plaintiff in this case is for an interlocutory and not for a perpetual injunction.

B

6.3. Counsel for the defendant contended that as far as the duration of the collaboration agreement is concerned the plaintiff was not relying on the terms of the collaboration agreement (which stipulated that the expiry of the initial C period was 31 May 2009) but instead was relying on what parties had purportedly intended the duration of the contract to be. By doing so, counsel contended that this was a new contract separate from the collaboration agreement altogether and that this new contract required D the defendant to perform a "continuous duty" extending over a period beyond three years. I cannot agree with counsel's contention on this as there is no suggestion whatsoever that the plaintiff is attempting to impose a new contract with new terms on the defendant. What E the plaintiff seeks to achieve at the arbitration proceedings is *inter alia*, to renew the collaboration agreement upon the existing terms. This will not amount to a new contract where the defendant is required to perform a "continuous duty" for a period beyond three years.

F

6.4. As stated earlier, the defendant will not be compelled to do any new positive acts or provide new services in favour of the plaintiff. Although there may be a loss of confidence between the parties and the cooperation of G the defendant will be required by the plaintiff in the continuance of its business operations, the *status quo* requirement would mean that it will be "business as usual" for the parties without any new positive acts being performed by the defendant which acts cannot be H supervised by the court. The general obligations of the defendant under the collaboration agreement will remain passive in nature.

6.5. As the defendant is holding over the lease of the tower land, it is only fair and equitable that the plaintiff should I be allowed to continue its operations until such time it is conclusively established that the defendant will not be granted the extension of the lease of the Tower Land.

6.6. Lastly I cannot agree with counsel for defendant that the grant of an interlocutory prohibitory injunction herein will amount to a reversal of the notice given by the defendant not to renew the collaboration agreement and that this would in fact mean that the collaboration agreement has been extended.

[7] The order granted by the court in respect of prayers 1(b) and 1(c) is restricted to the negative covenants to be observed by the defendant. The court did not order the defendant to perform any positive acts in favour of the plaintiff.